No. 16,055

United States Court of Appeals

For the Ninth Circuit

THE ANACONDA COMPANY,
a corporation,
Appellant,

vs.

BUTTE MINERS UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, et al.,
Appellees.

BRIEF OF APPELLEES.

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STATEMENT OF THE CASE.

The statement of the case in appellant's brief is accurate and complete *except in the one respect necessary for a fair understanding by the Court of the one basic issue in the case.* This relates to appellant's description of the nature of appellee's suit in the District Court as a suit to "compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who did not qualify for pensions" (p. 9).[1] As we will show in our argument, this ambiguous formulation serves to conceal the very ques-

[1]References in this form are to appellant's brief.

tion in issue. That question is whether the discharges by appellant of its employees who have reached 68 years of age are arbitrable under *the collective bargaining agreements* between appellant and appellees even though appellant claims that the discharges were proper under the separate pension agreements and plans[2] between the parties.

The District Court answered this question in the affirmative. We submit that the answer was indisputably correct.

I.

THE DISCHARGES OF THE EMPLOYEES ARE GRIEVANCES WHICH ARE ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENTS. ANY JUSTIFICATION FOR THE DISCHARGES THAT APPELLANT MAY HAVE UNDER THE PENSION PLANS IS A DEFENSE ON THE MERITS IN ARBITRATION, NOT AN ANSWER TO THE DEMAND FOR ARBITRATION.

A.

The title of this point is perhaps unconventionally long, but it is an effort to present the sole issue on this appeal in summary but complete form. This is important because appellant's brief, as we have already indicated, conceals the question.

This is *not* a suit to compel arbitration under the pension plans, but a suit to compel the arbitration of grievances under the collective agreements between the parties. The admission in the following allegation in appellant's answer to the complaint makes it clear

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[2]Referred to hereinafter as the pension plans.

beyond doubt that appellees, as parties to the collective bargaining agreements with appellant, sought arbitration under the agreements of the grievances resulting from the discharge of employees who had reached 68 years of age (R. 18-19):[3]

> "Admits that in each of the company's plants the defendant company has adopted a policy of termination, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the pension plan and their application are not subject to arbitration. Denies that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of employment of employee members not eligible for pension under said Section 2.1 (c) of the pension agreements to arbitration. . . ."

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[3]As in appellant's brief, references in this form are to Volume I of the Record.

It is therefore not accurate to describe this as a suit "to compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who do not qualify for pensions". This formulation makes it seem that appellees seek to compel arbitration *under the pension plans.* They do not. They seek to compel arbitration *under the arbitration provisions of the collective agreements.*

A re-statement of the basic facts will help set the issue in context. As appellant's brief sets forth (pp. 2-8), appellant (the employer) and appellees (the labor organizations) were parties to collective bargaining agreements and to the separate (but identical) pension plan agreements covering the employees at Butte, Great Falls, and Anaconda, Montana. Shortly after the pension plans were amended on October 15, 1954, appellant, to quote from its brief (p. 8):

> "adopted a policy of retiring employees at the age of 68 in accordance with the provisions of Section 2.1(c) of the plan (R. 18). Some of these employees did not have the required number of years of service to entitle them to pension payments under the plan. The plaintiffs objected to the retirement of these employees and presented grievances concerning them in accordance with the grievance procedure set forth in the collective bargaining agreements. The plaintiffs took the position that the defendant could not retire an employee at the age of 68 unless he had sufficient years of service to entitle him to a pension. The defendant refused to accept these grievances and to process them through the arbitration procedure provided for in the collective bargaining agreements (R. 18)."

The suit, then, as the complaint shows (R. 8-9) and the answer admits, as we have seen, is a suit to compel arbitration under the collective agreements, not under the pension plans.

The ambiguity in the phrasing of the issue in appellant's statement of the case appears in different guise throughout its brief. Thus, in the introduction to the argument, appellant asserts that the question is (p. 10):

> "whether or not the parties intended that disputes arising out of the interpretation and application of the pension agreements and plans should be subject to the grievance and arbitration provisions of the collective bargaining agreements."

And at the end of the same section, appellant argues that (p. 12):

> "with certain exceptions, it has not agreed and never intended to agree to arbitration of disputes involving the terms of the pension plans."

Then, in Point I of its brief, appellant says that (p. 13):

> "the dispute involves the question of arbitrating a controversy over an interpretation of the pension plans, which are separate documents and not part of the collective bargaining agreements."

In the first paragraph of Point II, appellant asserts (p. 16):

> "that it was not the intention of the parties to make their provisions subject to the grievance provisions of the collective bargaining agreements, and particularly the arbitration provisions."

In fact, Point II is devoted almost entirely to the argument that the dispute is under the pension plans and not under the collective agreements.

An analysis of Points III and IV of appellant's brief further indicates that the core of appellant's argument—though couched differently at different places in the brief—is that appellees seek arbitration under the pension plans and not under the collective agreements.

This presentation of the issue flies in the face of the pleadings, as we have seen. Also, as we will now try to show, it is illogical in that it stands the real issue upside down, so to speak, and would render an arbitration provision in a collective agreement nugatory if the employer merely asserts a defense to the grievance, whether the defense arises from a separate pension plan or in some other way.

B.

The fact of the matter is that the dispute about the discharges in this case is no different in essence from countless others which arise all the time under collective agreements. An employee is discharged. The union claims that the discharge is unjustified. The employer argues that it is not—that, for example the employee was incompetent, or insubordinate, or stole company property, or was absent too frequently without permission. The fact that the employer has, or thinks he has, a defense is not of course a reason why the arbitration provision of the collective agreement is inapplicable. The defense is a de-

fense on the merits to be made before the arbitrator, not a reason for opposing the process of arbitration itself.

In this case, appellant discharged employees because they were 68 years of age. Appellees, the labor organizations under the collective agreements with appellant, presented the discharges as grievances. Appellant resisted, so appellees demanded arbitration under the arbitration provisions of the collective agreements. The fact that appellant claims that the pension plans permit the discharges makes the case no different than the case in which the employer claims that an employee was discharged because he was inefficient or a thief or for some other reason. The defense is a defense which has to be made to the arbitrator when the case comes to be heard on the merits. It is not an agreement against arbitrability itself.

The analogies we have drawn in discharge cases under labor agreements can be extended to any lawsuit in which the defendant has or believes he has a defense. Thus, if appellant's argument were sound, a murder defendant could argue that since he claims he killed in self-defense, the indictment should nover go to trial at all and should be dismissed. In fact, if appellant is right, no civil or criminal court has jurisdiction at all once there is an alleged defense on the merits.

This argument of appellant's was succinctly answered by the Court below (R. 36):

> "Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense

in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes—in this case, the arbitrators—and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue."

It is also not inappropriate to note that the same argument as appellant makes here was made by a wholly-owned subsidiary of appellant, the American Brass Company, in a voluntary arbitration relating to the identical issue between that company at its Buffalo, N.Y. plant and Local 593 of the International Union which is one of the appellees in the instant case. In that case, unlike this, American Brass voluntarily agreed to submit the dispute as to arbitrability itself to arbitration. In an unpublished award and opinion, Dean J. D. Hyman of The University of Buffalo School of Law rejected the same argument now made by appellant on the basis of a pension plan *in haec verba* with the one involved here and held that the dispute is arbitrable. (It should also be noted that in the subsequent voluntary arbitration on the merits, Dean Hyman held that Section 2.1 (c) of the pension plan—similarly numbered, as here, because the plans are identical in every respect, even as to form—did not permit termination of employees at age 68 unless they were entitled to pensions and that,

therefore, the termination of such employees was improper under the collective agreement.)[4]

Whether or not Section 2.1 (c) of the pension plans permits the involuntary retirement of employees when they become 68 years of age even though they are not entitled to pensions—and of course we agree with Dean Hyman that it does not—the matter is one to be determined in arbitration. A conclusion that the matter is not arbitrable would render arbitration clauses in collective agreements meaningless and be a severe blow to the very principle of arbitration.

II.

TERMINATION OF EMPLOYMENT IS ARBITRABLE UNDER THE COLLECTIVE AGREEMENTS AND THE FACT THAT THE PENSION PLANS ARE IN SEPARATE AGREEMENTS IS IRRELEVANT.

Although appellant made an issue of the matter in the District Court, appellant does not now argue that grievances about discharges or terminations of employment are not covered by the provisions of the collective agreements relating to the presentation of grievances and the arbitration of disputes. Judge Murray's careful analysis of the agreements (R. 29-33) has apparently set that matter at rest.

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[4]Even though Dean Hyman's awards and opinions are unpublished, we feel free to refer to them not only because the American Brass Co. is a wholly-owned subsidiary of appellant, but also because the awards and opinions were referred to in the argument below on the motions for summary judgment. Dean Hyman's award and opinion on the matter of arbitrability is dated August 27, 1956, and his award and opinion on the merits is dated February 4, 1957.

Appellant has then abandoned the argument that disputes relating to discharges are not arbitrable under the collective agreements. Appellant argues, however, that the pension plans are in agreements separate and distinct from the collective agreements and that the pension plans do not provide for the arbitration of the disputes in question. Appellant also lays stress (Point III, p. 22) on a clause in the pension plans that the plans are not to be construed as a part of or collateral or supplemental to any collective bargaining agreements. Different phases of this argument appear in each of the four points in appellant's brief.

This argument of appellant's is actually a variation of the argument we have dealt with in Point I and likewise begs the question. Since appellees are demanding arbitration under the collective bargaining agreements and not under the pension plans, it is irrelevant that the pension plans are separate and distinct or that the pension plans do not provide for the arbitration of disputes such as these. And merely because apepllant relies on the pension plans as justification for the termination of the employment of appellees' members an order to arbitrate under the collective agreements would not make the pension plans "part of, or collateral or supplemental to" the collective bargaining agreements.

Suppose, for example, that state or federal legislation was enacted which required appellant to discharge all employees who are 68 years old and that appellant thereupon discharged all such employees

If appellees then demanded arbitration under the collective agreements, would it be logical for appellant to resist it because the statute is separate and distinct from the collective agreements or because the statute does not provide for arbitration? Would an order to arbitrate under the collective agreements mean that the Court was making the statute "part of, or collateral or supplemental to" the collective bargaining agreements?

The answer to these questions is obviously in the negative. Otherwise, arbitrability would always be determined by the nature of a defense on the merits and not by the character of the grievance and the provisions in the collective agreement relating to arbitration.

The District Court made two further irrefutable answers to this argument of appellant's (R. 34-35):

> "Defendant also seeks some support for its position in the provision of the pension agreements to the effect that such agreements are separate and distinct documents and are not to be construed as a part of or collateral or supplemental to any collective bargaining agreement. This provision of the pension agreements, however, seems to the Court to weaken the position of the defendant, for if the pension agreements could be considered as amending or supplementing the collective bargaining agreements, then they might be considered, as the company urges, in determining whether the present controversy presents an arbitrable issue under the collective bargaining agreements. Being by their express provisions

not amendatory of or supplemental to the collective bargaining agreements, the pension agreements cannot be considered in deciding the issues of arbitrability under the collective bargaining agreements. There is likewise a provision in each of the collective bargaining argeements that 'This contract is exclusive for its entire term and not subject to further negotiation and is to cover all contract relations between the parties for its entire term', which prevents any recourse to the pension agreements in determining the question of arbitrability presented here.

There is this additional circumstance which impels the Court to the conclusion it has reached. The pension agreements were all in existence at the time the last collective bargaining agreements with the broad, all inclusive provisions for disposing of controversies and grievances previously pointed out were executed. At that time, had the parties intended to exclude such a controversy as the instant one from the grievance procedures they set up on the ground that it was covered by the pension agreements, as defendant now maintains, it would have been a simple matter to so state in the collective bargaining agreements as they did with respect to questions concerning wage scales and differentials."

In other words, if the parties had so intended, a clause in the collective bargaining agreements to the effect that any dispute arising because of any action appellant took under the pension plans would not be a grievance and would not be arbitrable under the collective agreements, would have put the horse before

the cart. Without such a clause, appellant is trying to put the cart before the horse.

CONCLUSION.

This dispute has already lasted for four and a half years. Such a delay makes a mockery of collective bargaining and particularly of the concept of arbitration. It is, and has long been, congressional and federal judicial policy to foster and enforce labor arbitration in industries affecting commerce. *Textile Workers & Lincoln Mills,* 353 U.S. 448, 455, 460. And "if arbitration is here to stay", as Judge Folmer remarked in the passage quoted in the opinion below (R. 31) from *Insurance Agents International Union v. Prudential Insurance Co.,* 122 Fed. Supp. 869, 872, the effort made by appellant in this case to resist the arbitration provisions of the collective agreements should not be allowed to succeed.

It is therefore respectfully submitted that the judgment of the District Court ordering appellant to submit the dispute between the parties to arbitration under the collective bargaining agreements should be affirmed, with costs.

NATHAN WITT,
Attorney for Appellees.